THE TRUE MEANING OF THE TERM "LIBERTY" IN THOSE CLAUSES IN THE FEDERAL AND STATE CONSTITUTIONS WHICH PROTECT "LIFE, LIBERTY, AND PROPERTY."

IF there is one truth which, more than another, should be constantly borne in mind by one whose object is to ascertain the true meaning of any part of the law of our American constitutions, it is that that law is not a manufacture, but a growth, and that it is, therefore, impossible thoroughly to comprehend its true scope and meaning, without at least some knowledge of its history and development. In this respect, English and American constitutional law differs widely from that of France, for example, which is substantially nothing more than an attempt to establish a system of government on entirely new and theoretical principles, artistic in form, but without any very deep basis in the history and habits of the people. Such law, while it is the source and "garantie" of fundamental rights, is in no proper sense a consequence or generalization of rights existing independently, and if it should be abolished, the rights which it guarantees would disappear with it. The English Constitution, on the other hand, so far from being a work of modern art, a manufacture, is the result of centuries of bloodshed and strife, during which the "freemen" of England gradually secured their fundamental rights in the law courts, and established limitations of the regal power. In this view it is rather a result than a cause. It exists as a consequence or confirmation of the rights which it represents, and unless those

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rights had been independently secured, the English Constitution could never have existed. In other words, it is part and parcel of the law of the land, a generalization of common-law rights, the natural outgrowth of the customs of the people. And so is it also with our American constitutions. They are historical instruments, the possessions of a people with a legal history beginning, not with the Declaration of Independence, but with that of their English brethren. They are not the beginning, but the end; for they represent the last stage in a series of changes, the great landmarks of which are the Magna Charta, the Petition of Right the Habeas Corpus Act, and the Bill of Rights.

It is obvious, therefore, that one who seeks to put a true construction on any part of our constitutions must have a constant eye to its history, and this is particularly the case when one is dealing with a clause in a bill of rights, because an American bill of rights is a collection of words and clauses, many of which have had a definite meaning for centuries. It may be true that if our constitutions are to meet all the requirements of a constantly advancing civilization, they must receive a broad and progressive interpretation. It is also true that upon no legal principle can an interpretation be supported, which ignores the meaning universally accorded to a word or clause for centuries, and the meaning which must, therefore, have been intended by those who inserted it in the constitution.[1] It is perhaps well to bear this in mind at a time when there is a manifest tendency to regard constitutional prohibitions as a panacea for moral and political evils, to look upon courts of law, as distinguished from legislatures, as the only real protectors of individual rights, and to trust to the courts for remedies for evils resulting entirely from a failure to attend to political duties, — at a time, that is to say, when there is danger of loose and unhistorical constitutional interpretation.

It is not within the scope of this essay to discuss at any length

[1] "The members of the convention unquestionably used the words they inserted in the constitution in the same sense in which they used them in their debates. It is their object to be understood, and not to mislead, and they ought not to be supposed to have used familiar words in a new or unusual sense. And there is no reason to suppose that they did not use the word 'imports,' when they inserted it in the constitution, in the sense in which it had been familiarly used for ages, and in which it was daily used by themselves. If in this Court, we are at liberty to give old words new meanings when we find them in the constitution, there is no power which may not, by this mode of construction, be conferred on the general government, and denied to the state." — Chief Justice Taney in the Passenger Cases, 7 How. 478.

the nature and meaning of liberty, as that term is used in a broad and general sense to denote the great object of all free governments, — as it is used, for example, in the preamble of the Constitution of the United States. There are, however, a few general principles which it will be well to notice at this point.

Liberty, or civil liberty, as it is often called, has been defined by a hundred eminent writers, one of whom has remarked that "most of these definitions are not worthy of notice." As the term is used by philosophical writers, it does not appear to have any very definite meaning. As used by jurists, it is more capable of definition, because it signifies not so much a theory as a condition, not so much an ethical conception as a concrete existence. In this sense it is defined by Blackstone to be the "liberty of a member of society," and "no other than natural liberty so far restrained by human laws (and no farther), as is necessary and expedient for the general advantage of the public." With "natural liberty," or, as Cicero phrased it, "the power of living as thou willest," writers who are concerned with facts have nothing to do. Such persons deal only with liberty as it does or may exist, that is, in a state of society and in a body politic. A state of nature is a fiction. In this view the term is obviously a relative one, and it is, accordingly, proper to speak of modern and ancient, of Pagan and Christian, of English, of French, and of American liberty. Each of these systems has peculiar features, but they are all alike in one respect, in that they each and all represent the number and kind of important individual rights which have been secured in the social state under different forms of government. They all differ, in that no two of them afford precisely the same degree of right or liberty to those living under them. In England and the United States the number of rights and remedies which have been secured is very large. In Russia it is very small. Consequently, it is correct to say that Anglican liberty has reached a very high stage of development, while Russian liberty is, if the term were used in a more ethical sense, hardly worthy of the name. We are apt to connect the term with the particular form of government under which we enjoy that for which the term stands. So it was with the ancients, — the Greeks and Romans, — who identified it with a republican form of government. So also Americans are apt to connect it with the same form of government, as represented by the Constitution of the United States.

At bottom, however, the word "liberty," used in its broadest and most general sense, means and includes all those great rights, remedies, and guarantees which a human being has in a given state of society or under a given government, and that is the way it was used by our ancestors, who entitled their bill of rights a "body of liberties," and by Blackstone, in his chapter on the Absolute Rights of Individuals.[1] Taken in this sense, as being synonymous with civil or social rights, as distinguished from "natural" rights, American liberty includes the rights of life; of freedom of the person, of speech, and of the press; of religious freedom; of petition; of discussion; of marriage; of taking part in the government, and many others. All such rights are — with certain limitations, which make them truly social or civil rights, and apart from which the above terms cannot be understood — enjoyed in this country, as a matter of fact, whether or not they are all declared in our constitutional law. The question with which we are at present concerned, however, is the latter, or rather, is the question as to how many of the above-mentioned rights are included under a particular term in a particular clause in our most fundamental law.

In the Federal Constitution and in the constitutions of at least twenty-eight of our States there are clauses which in substance declare that no person shall be deprived of "life, liberty, or property (sometimes 'estate'), but by the judgment of his peers or the law of the land." In some constitutions the same rights are first declared in the ancient terms of the prototype of these clauses (to be noticed later), and are then summarized as above; and in some we find instead of "judgment of his peers or law of the land," the expression "due course (or 'process') of law;" but it is well settled that "due process of law" and "law of the land" are identical in meaning,[2] and the other variations are not important, because they do not affect the identity or history of the clause. A somewhat similar combination of terms occurs in other places in several of our constitutions, where perhaps the term "liberty" is used in a different sense.[3] At present, however, we are concerned with it as it is used in this

[1] See also Lieber on Civil Liberty.

[2] 1 Cooley's Blackstone, 135, n.

[3] See, for example, the Constitution of Massachusetts, which, following the Declaration of Independence, declares that all men have natural rights to life, liberty, and the pursuit of happiness.

peculiar connection, namely, in those clauses which forbid the taking of the three liberties in question unless by due process of law or the law of the land, unless, as Webster has so well expressed it, "by the general law, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, and property under the protection of the general rules which govern society." In this connection we shall perhaps find that the term "liberty" is fairly susceptible of a somewhat narrower construction than when used collectively to denote all those rights of which, generally speaking, no man ought to be deprived under any circumstances whatever; to denote, that is, an ideal of government. In this present connection the deprivation of the right named is contemplated as a necessary and usual thing. Indeed, it is worth noticing that in this connection the word and clause with which we are dealing are in almost every instance inserted in a section of the constitution dealing exclusively with the conduct of criminal trials, with the privileges of the accused, with a process in which the whole question is whether the person concerned shall be deprived of one or the other of certain rights; that is, of life, or *personal* liberty, or property as a penalty for crime; and it is declared that he shall not, without due process of law. *A priori*, therefore, it would seem that in this connection the term is not used in its broadest sense to denote all civil rights, but, like the terms "life" and "property," to denote one particular kind of civil right, of which the law is accustomed to deprive persons by way of punishment.

The clause in question has a definite and a most ancient history. It is of Teutonic origin, and Professor Stubbs states that the very formula here used is probably adopted from the laws of the "Franconian and Saxon Cæsars."[1] At any rate we find it in almost precisely the same form in which it has been incorporated into many of our American constitutions at the beginning of the thirteenth century in the Magna Charta of King John of England.[2] That century comprises at once the gloomiest and the most auspicious period of English history. During that century the English people were oppressed by a foreign and conquering race, were ruled by two of the worst kings that ever ascended the

[1] Constitutional History of England, vol. 1, p. 577.

[2] Stubbs' Select Charters, 301.

English throne, and were in large numbers reduced to a condition of slavery. Yet during that same period the foundations of the English parliament, the English constitution, and the science of the English common law were laid. On June 15, 1215, King John, at the point of the sword, was compelled by the English barons to affix his seal to the "Great Charter of English Liberties," — a document upon which the unstinted praise of historians of every school and stamp has ever since been lavished. In one aspect the Magna Charta represents an end and consummation, in another a beginning. It was, for the most part, a compilation of the ancient customs of the realm,[1] or the laws of King Edward the Confessor as they existed before the Norman conquest. On the other hand it was the first great declaration of the rights of the new nation, the various elements of which several causes had combined to unite and consolidate, and from this time forth the constant demand of the people is for a confirmation, not of the "Leges Edwardi," but of the Magna Charta. It was, according to Lord Coke, confirmed no less than thirty-two times by subsequent monarchs. During the long reign of Henry III. the rights which had been wrested from King John were not only preserved, but also increased. During that of Edward I., who attempted to govern arbitrarily, it was the same. One remedial statute after another was passed, until finally every Englishman came to regard the Magna Charta and its confirmations as his birthright. We are told by Hallam that it is doubtful whether there are any essential privileges of Englishmen, "any fundamental securities against arbitrary power, so far as they depend upon positive institution, which may not be traced to the time of the Plantagenets. The same author has characterized the Great Charter as "still the keystone of English liberty. All that has since been obtained is little more than confirmation or commentary; and if every subsequent law were to be swept away, there would still remain the bold features that distinguish a free from a despotic monarchy."

It should be noticed, however, that the main object of those who did most to obtain the charter was to secure their own rights, not those of others. At that time the barons themselves were really the chief oppressors of the people. The king did all he could in that direction; but he was one, the barons many.

[1] Blackstone's Law Tracts, p. xii.

The king oppressed his barons, and they oppressed the people. The kind of oppression to which the barons were subjected by the king was, moreover, very different from that exercised by the former on the people. It consisted, mainly, of the hardships incident to the feudal system, such as wardship and marriage, aids and escuage. But the wrongs suffered by the people at the hands of the barons were far more intolerable. They were despoiled of their property, were taken and imprisoned in the castles of the barons in order to extort ransoms, and were even put to death without any pretence or process of law. The chronicles of that period afford evidence of systematic outrages practised by the barons on the people for which it would be difficult to find a parallel in English history. This has not been sufficiently borne in mind by those historians who have eulogized the English barons for their great solicitude concerning the interests of the people, for their generosity in caring for the interests of the people as well as their own, and for their foresight in establishing such far-reaching and eternal principles of liberty. The truth seems to be, not only that the charter was obtained chiefly through the efforts of the barons, but also that it was intended, first of all, for their protection. The bulk of it relates to feudal matters, applied only to those who held land by military tenure, and therefore affected the mass of the people only indirectly. It has been suggested that those articles which do include the people, and which are of a fundamental character, were inserted at the instance of the king. Whether or not such is the truth, however, the Great Charter did contain at least one provision which included all freemen, protected them against all persons, and which, if enforced, would forever secure to them their most fundamental rights. Moreover, — and this is the point especially to be noticed, — that article was intended rather to afford a practical remedy for cruel and intolerable invasions of certain elementary rights than to announce theoretical principles of right for future ages, — or even for themselves, — or to establish a great principle of what we of this century are pleased to call "constitutional" law.[1] Nor did it declare it to be self-evident "that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." This is worth observing, because it throws a strong light

[1] Macaulay's History of England, vol. I, ch. I.

on the article of which our "life, liberty, and property" clauses are either copies or slight variations.

The provision referred to is, of course, the thirty-ninth article of the Great Charter. It declares that "nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae."[1] No freeman shall be taken, or imprisoned, or disseized, or outlawed, or banished, or any ways destroyed; nor will we pass upon him, nor send upon him,[2] unless by the legal judgment of his peers, or by the law of the land. In the confirmatory statute of 9 Henry III., which is the form of the Great Charter found in the Statutes at Large, and is therefore part of the existing law of England, the above article is slightly enlarged. After the word "disseized" we find "of his freehold, or liberties, or free customs" ("de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis"),[3] — an addition obviously intended to explain the right of property which the word "disseized" represents and declares. In another statute, passed in the fifth year of Edward III., the same article is rendered as follows: "No man shall be attached by any accusation, nor forejudged of life or limb, nor his lands, tenements, goods, nor chattels seized into the king's hands, against the form of the Great Charter and the law of the land," — a clear declaration of the rights of personal liberty, life, and property. In 25 Ed. III. Statute 5, chapter 4, we find a more extended reading: "None shall be taken by petition or suggestion made to our lord the king, or to his council, unless it be by indictment or presentment of good and lawful people of the same neighborhood where such deeds be done, in due manner, or by process made by writ original at the common law; nor that none be out of his franchises, nor of his freeholds, unless he be duly brought into answer and forejudged of the same by due course of law." Finally in 28 Ed. III., c. 3, the same declaration of rights is put still more clearly as follows: "No man, of whatever estate or condition that he be, shall be put out of land

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1 Stubbs' Select Charters, 301.

2 That is, send others to pass upon, or condemn him; 2 Institute, 54.

3 "Libertatibus" is evidently used here in the technical sense, meaning a privilege of an exclusive nature — a franchise. "Liberis consuetudinibus" means simply customary rights.

or tenement, nor taken nor imprisoned, nor put to death, without being brought in answer by due process of law."[1]

The last four enactments are simply confirmations of the thirty-ninth article of the original charter, just as that article may be said to be a confirmation of the common law as it stood in 1215.[2] The rights set forth were not conceived of for the first time in 1215. They were rights which free Englishmen had always claimed, and theoretically had always possessed under the common law. The importance of the thirty-ninth article of the Magna Charta is, that it was almost the first clear and perfect publication of those rights, and that after it the mass of the people came to know more thoroughly and more universally, precisely what their rights were in theory, and so were able to make a harder fight for them in practice. In short, the article was a plain, popular statement of the most elementary rights. What, then, were those rights?[3] In the original clause and in all its confirmations the general classification is the same, and, expressed in more modern phraseology, is simply life (including limb and health), personal liberty (using the phrase in its more literal and limited sense to signify freedom of the person or body, *not* all individual rights), and property.[4] In 1215 the expression "personal liberty" was not in use, but the idea, or better, — considering the condition of England at the time, — the ideal, was not only known, but, as we see, was set up in the above series of enactments; and the terms employed to express it were sufficiently plain: "No freeman shall be taken or imprisoned." Could any words more clearly express what we of this century intend when we talk about personal liberty, or about the great Habeas Corpus principle of Anglican liberty? It would seem not. It would seem, indeed, that the words which we should naturally

[1] For copies or confirmations of this article of Magna Charta by the early American Colonists see the Massachusetts "Body of Liberties," of 1641, and the "General Fundamentals" of the Plymouth Colony, 1 Hazard's State Papers, 408.

[2] 2 Coke's Inst., proem; 1 Blackstone's Com's, 128.

[3] "But the essential clauses of Magna Charta are those which protect the personal liberty and property of all freemen, by giving security from arbitrary imprisonment and arbitrary spoliation. 'No freeman shall be taken or imprisoned,' etc. It is obvious that these words, interpreted by an honest court of law, convey an ample security for the two main rights of civil society. From the era, therefore, of John's Charter, it must have been a clear principle that no man can be detained in prison without trial." Hallam's Middle Ages, 423.

[4] 4 Blackstone's Com's, 424.

use to-day to explain what is meant by personal freedom are the precise equivalents of the plain, simple Latin terms of that age: "Nullus liber homo capiatur vel imprisonetur." These words were, moreover, employed in the thirty-ninth article to express an idea which was just as dear to the men of that time as it is to us, remote as was the prospect of its complete realization in 1215. When they drew the famous thirty-ninth article that right was put first; and Lord Coke remarks, — in his commentaries on the article, where he points out that the evils from the laws of the land are to protect the subject, are recited in the order in which they most affect him, — that "this hath first place, because the liberty of a man's person is more precious to him than everything else that it is mentioned, and therefore with great reason should a man by law be relieved in that respect, if wronged."[1] Coke then discusses the meaning of the word "disseized," which he finds to include several varieties of rights, all of which may be included under the term "property," — which, however, does not occur in the Magna Charta or in any of its confirmations. According to Coke, this right is classified after that of personal liberty, because less sacred. Nevertheless, in the statute 28 Ed. III. c. 3, cited above, which is a confirmation of the thirty-ninth article in the original charter, the order of rights in the latter is reversed, property coming first, then personal liberty, then life. It seems, however, that no great importance is to be attached to the arrangement. The essential point is that all the enactments cited — to which others might be added — declare three great fundamental rights by prohibiting the doing of certain acts. Those rights are, perhaps, the most elementary and important rights conceivable, and are the ones with the development of which English constitutional history is chiefly concerned. They were brought together, and for the first time authoritatively and publicly announced to Englishmen as Englishmen in the thirty-ninth article of the Great Charter.

At what period the rights in question took on their present nomenclature and began to be termed the rights of "life, liberty, and property" it is impossible to say with any precision. The terms themselves are probably as old as the language. It cannot be said that they are fortunate ones in this particular connection and combination, because their meaning is vague and uncertain

[1] Second Institute, 54.

without some historical explanation. Perhaps such uncertainty is a necessary evil in all instruments which, like American bills of rights, represent a long period of development. The terms used in the original article are much more definite, and in some of our constitutions have been copied literally, with the words "life, liberty, and property" added by way of summary, and, as it seems, by way of supererogation.[1] We have noticed that the the term "liberty," generally in the plural number, was formerly used to denote a right or privilege. Thus the Magna Charta itself was entitled the "Charta Libertatum." We have also noticed that the expression "civil liberty" is, in the same sense, simply a collective for all the rights, political, religious, and civil (using the word "civil" in the narrow and rather loose sense which it has recently acquired in this country), which a person has in a given social body, that is, under a given government. The term was formerly used in still another way, to denote, not any right or privilege, but an exclusive right or a franchise, and that is probably the sense in which it was used in the thirty-ninth article of Magna Charta, as confirmed by 9 Hen. III. c. 29. In all these cases, however, the term was not used in connection with the fundamental rights of life and property to express a third great right, as is the case in our American constitutions, and in the latter it must, therefore, be held to have a different meaning. In them it is not used to denote any and all rights, or to denote a right vested exclusively in one person, but to denote a particular kind of right to which every person is entitled, unless it is taken away by due process of law. It is used, in other words, just as the terms "life" and "property" are used, each to express a special kind of right. It is as unreasonable to say that "liberty," in this connection, includes all civil rights, as it is to say that the term "life" includes them, or that the term "property" includes them. If it did, it would include life and property, and the clause reading, "no person shall be deprived of life, all his rights, or property," would be an absurdity on its face. The fact is that each of these terms has a peculiar and definite meaning, and it seems clear, on the whole, considering the history of the clause, that the term in question means personal liberty, or freedom of the person from restraint. Personal liberty was a common-law right in England in 1215, and long before; it was one of the great rights declared in the thirty-ninth article of the

[1] See, for example, the constitutions of Massachusetts, New Hampshire, and Maryland.

Great Charter; it was insisted upon in all the confirmations of that article, and is there always found in connection with the rights of life and property; its infringement was the chief complaint in the Petition of Right of 1627, and the Habeas Corpus Act of 1679 was passed solely to secure it against usurpation. Altogether, it may be said that the history of the growth and development of the right of personal liberty is the main element in the history of early English constitutional law, that the idea of personal liberty pervades the history of the Anglo-Saxon race, and that it is, therefore, not surprising to find it classified with the rights of life and property as one of the three greatest civil "liberties."

It may, however, be contended that although the term "liberty" is not used in the clauses under discussion in its broadest sense to include all the rights one has in a body politic, it does include other great and important rights besides that of personal liberty, as, for example, religious liberty, liberty of speech and of press, liberty to bear arms, of petition and discussion, liberty to obtain justice in the courts, and many others, all of which are to-day regarded as fundamental rights in this country.[1] It may be argued, in other words, that the term "liberty" is a broader one than the terms used in Magna Charta, and may well be interpreted to include other rights besides that of personal freedom, for the reason that it was probably intended so to do by the framers of our constitutions. There are several answers to this argument. In the first place, the clauses in our American constitutions are, as we have seen, mere copies of the thirty-ninth article of Magna Charta, which knows nothing of such rights as the above. In the second place, the term "liberty," while it was not used in the thirty-ninth article, was used in its present connection with the terms "life" and "property" long before the framing of our American constitutions, and when so used meant simply personal liberty. It would, therefore, naturally be used by the framers of our constitutions in that sense. To establish this it is only necessary to refer to Blackstone. In one place Blackstone remarks: "The Great Charter protected every individual of the nation in the free enjoyment of his life, liberty, and

[1] See Judge Cooley's discussion of the fourteenth amendment in the appendix of his edition of Story on the Constitution. See also his discussion of "Civil Rights" in the "Principles of Constitutional Law."

property unless declared to be forfeited by the judgment of his peers or the law of the land," referring, of course, to the thirty-ninth article. In another place he discusses the subject more at length, and after defining the absolute rights of individuals, "which are usually called their liberties," to be "those rights which are so in their primary and strictest sense, such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy whether out of society or in it," he goes on to enumerate them: "These rights may be reduced to three principal or primary articles: the right of personal security" (under which he includes life, limb, health, and reputation, the same rights which Coke and other commentators on the thirty-ninth article include under the terms "aliquo modo destruatur," and which may fairly be included under the term "life" in our constitutions), "the right of personal liberty, and the right of private property, because, as there is no other known method of compulsion or of abridging man's natural free will but by an infringement of one or the other of these importants rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense."[1] Blackstone defines personal liberty to be the "power of locomotion, of changing situation, or moving one's person to whatever place one's inclination may direct, without imprisonment or restraint, unless by due course of law," and he observes that it is perhaps the most important of all civil rights. He means by personal liberty simply freedom from restraint of the person. It is instructive to note that Blackstone, in discussing each "absolute" right, points out that it is declared and secured by the famous article of the Great Charter. He cites the words "nullus liber homo aliquo modo destruatur" as the constitutional security for the right of life or personal security; the words "capiatur vel imprisonetur" for the right of personal liberty, and the words "dissaisiatur de libero tenemento" for the right of private property. It is evident, therefore, that his classification of fundamental rights under the terms "life," "liberty," and "property," like that of all other commentators, is derived from the thirty-ninth article. It is evident, also, that he had no conception of religious liberty, liberty of press and speech, or political liberty (meaning thereby the right to take part in the government, *e. g.*, the right to vote) as absolute

[1] 1 Bl. Com's, chapter on "Absolute Rights of Persons."

rights of individuals. They are not mentioned in his discussion of the subject. He does, indeed, name certain other important individual rights besides those of life, personal freedom, and property, such as the right of petition, of securing justice in the courts, and of bearing arms; but he says that these "serve principally as networks or barriers to protect and maintain inviolate the three great and primary rights."

In "Care's English Liberties," a collection of important English Charters which had a wide circulation in the American colonies, the fifth edition of which was published in Boston in 1721, we find the same classification of rights in the same terms, and in every case the term "liberty" is explained to mean freedom of the person from restraint. For example, in his comment on the Habeas Corpus Act the author says: —

> There are three things which the law of England (which is a law of mercy) principally regards and taketh care of, viz., life, liberty, and estate. Next to a man's life the nearest thing that concerns him is freedom of his person; for indeed, what is imprisonment but a kind of civil death? Therefore, saith Fortescue, cap. 42, the laws of England do, in all cases, favor liberty. The writ of Habeas Corpus is a remedy given by the common law, for such as were unlawfully[1] detained in custody, to procure their liberty.[1]

Chancellor Kent made precisely the same enumeration of fundamental rights, with religious liberty added as a distinct and separate right.[2] There is no suggestion of its being included in the clauses in question. Indeed, religious freedom is a modern idea, and may be regarded as one of the contributions of this country to civil liberty. It was totally suppressed and unrecognized in England in the seventeenth century.[3] In theory it does not exist in England to-day. Any person who publishes a denial of the truth of the Christian religion, or of the existence of God, commits a blasphemous libel, and is, on the existing law, liable to imprisonment. It matters not whether the terms of the publication are decent or otherwise. So, a denial of the truth of Christianity, or of the Scriptures, by any person who has been educated as a Christian in England, is a criminal offence, entailing severe punish-

[1] Care's English Liberties (Ed. 1721), p. 185.

[2] Kent's Com's, vol. 2, chap. 1.

[3] Hume's History of England, vol. vi. 158, 165.

ment.[1] Even in this country religious liberty has not always flourished. In fact all the early colonies, except Rhode Island, absolutely denied it, and it cannot be said to have become generally established as a right until well into the last century. And so it is with what we call "liberty of the press," which means nothing more than liberty to publish any statement without the permission of a licenser, or freedom from censorship. This right is also of very recent origin. It is not mentioned in the Petition of Right (1627), nor in the Bill of Rights (1689), of so little importance did it seem to those engaged in redressing the grievances of that time in England.[2] In the colonies the feeling was the same. In 1671 Governor Berkeley, of Virginia, "thanked God that there were no free schools or printing; and I hope we shall not have them these hundred years; for learning hath brought disobedience and heresy into the world, and printing hath divulged them. God keep us from both."[3] He was speaking of the condition of the colonies in reply to English Commissioners. In 1683, when Governor Dongon was sent out as governor of New York, he was expressly directed not to allow any printing.[4] In Massachusetts the publication even of State papers did not become free until 1719.[5] Yet at this time, as always, the colonists most strenuously asserted their rights to life, liberty, and property; and Chalmers, in his Colonial Annals, declares that they are "assuredly entitled to the same liberties which are enjoyed by those whom they had left within the realms." "They were entitled to personal security, to private property, and, what is of most importance of all, to personal liberty."[6] On the whole, therefore, one is fully justified in saying that liberty of press and religion, and of speech, were unknown and unclaimed as rights, not only when the thirty-ninth article of Magna Charta was formed, but also centuries later when the terms of that article became paraphrased or consolidated into the more modern expression, "life, liberty, and property." That phrase was probably in use

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[1] 9 & 10 Will. III. c. 35; 53 Geo. III. c. 160; Dicey on the "Law of the Constitution," 257.

[2] It was not fully obtained in England until 1694. See 2 Cooley's Blackstone, 135, note (a).

[3] Chalmers' Annals, 328.

[4] 2 Hildreth's History, 77.

[5] 2 Hildreth, 298.

[6] Chalmers' Annals, 678.

long before the eighteenth century, and when used could not have included the above rights because they did not exist at all, or were not deemed important. Such being the case, and the terms having taken on a fixed meaning, it is reasonable to suppose that the makers of our constitutions used them with that meaning, just as Blackstone did when he employed them to denote the three great absolute rights of individuals.

In regard to such "liberties" as those of petition and discussion, of trial by jury, of Habeas Corpus, of bearing arms for defence, of taking part in the government, and many others, important as such rights are, they cannot be said to be fundamental in the sense that life, personal liberty, and property are fundamental rights. Strictly speaking, they are not substantial rights at all. As ends in themselves they are of no value. They are what Blackstone terms "subordinate" rights. In other words, they are really the remedies or means which must often be employed in order fully to obtain and enjoy the real and substantial liberties. If the term "liberty" is held to mean civil liberty in its broad sense, all such rights must undoubtedly be included within it; but so must the rights of life and of property. It is only fair to assume that when the term was used by the framers of our constitutions, it was intended by them to have a definite meaning. As has been indicated, it had always had a definite meaning in the past. It is barely possible that they intended it to comprise all the liberties a person was to have under the form of government which they were about to establish. But if such was their intention, why did they use the term in its ancient connection, with two other terms which had a historical meaning, but which, upon that theory, would be entirely superfluous and meaningless? If they intended it to mean civil liberty, and to include such rights as those of marriage, of education, and of employment, it would, of course, necessarily include the more fundamental rights of life and property, and the enumeration of the latter would be useless. If their intention was as supposed, it would surely have been more natural for them to have inserted a clause reading: "No person shall be deprived of any of his civil rights or liberties unless by due process of law." Such a clause was inserted in the constitution of New York, article 1, section 1 of which provides that "no member of this State shall be disfranchised or deprived of any of the rights or privileges secured to

any citizen thereof unless by the law of the land or the judgment of his peers." And yet another section of the same article, in providing for the rights of criminals, declares that "no person shall be subject to be twice put in jeopardy for the same offence; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law." If the term "liberty" in the last clause has the meaning sometimes suggested, the first clause is entirely superfluous; and yet it is a canon of the interpretation of solemn instruments like constitutions, that a clause is not to be so construed as to render another clause entirely superfluous without very strong evidence.

Moreover, the important rights which, if the term is used in the broad sense, must be included within it, are in all our constitutions specially provided for in separate, and often elaborate clauses. Thus the Federal, and almost all the State constitutions, provide in different terms for freedom of religion, of speech, and of press, for the right of trial by jury, of bearing arms, and the right of petition. So also constitutional protection is afforded against unreasonable searches and seizures, against quartering soldiers in private houses, and against excessive punishments. All these are certainly civil rights, and a part of one's liberty under American government. Yet it seems to the writer that the mere fact that these — which may be described as rights of the second degree of magnitude — are provided for in separate clauses is a fair and strong argument to show that they were not intended to be included in a clause of a very different nature, which enumerates and protects in historical language those great liberties which have, from time unknown, been deemed the most fundamental rights of a freeman. That such a clause includes all rights, great and small alike, seems to the writer an untenable interpretation. And yet if it includes any besides the right of personal liberty, there seems to be no reason why it should not include all.

Finally, there is one other fact, already adverted to, in the nature of intrinsic evidence, which is worth noticing. If "liberty" includes all great civil rights, it must include such rights as religious liberty, trial by jury, and liberty of press. The clause being interpreted would then read: "No person shall be deprived of his religious liberty, etc., unless by due process of law." But the supreme, fundamental law, as declared by our constitutions, is that a

person shalt *never* be deprived of those rights, that they shall be inviolate and sacred forever. Therefore, how can such rights fairly be construed into a clause contained in a section dealing with the punishment of crime, a clause naming rights which are constantly taken away, which itself implies that they must always constantly be taken away, and which only stipulates that they shall be taken by due process of law? In other words, is it fair to suppose that the framers of our constitutions intended, first, to declare certain rights to be in every case and under all circumstances inviolable, and then to declare, or to imply, that the same rights might be taken away by due process of law? It would seem that such an intention cannot be imputed to them.

So much for the question considered entirely as one of principle. If the conclusion arrived at is correct, the term "liberty," as used in those clauses which protect "life, liberty, and property," unless taken by "due process of law," means nothing more or less than freedom of the person from restraint, — the great Habeas Corpus principle of Anglican liberty, — a right, the illegal invasion of which gives rise to an action of false arrest or imprisonment. It must be admitted that this view is not altogether supported by the adjudged cases. In fact, the precise view here maintained is repudiated by several decisions. On the other hand, as far as the present writer has been able to discover, the courts themselves have not yet arrived at any very definite conclusion regarding the scope of the term. There is some general discussion in the books about the origin and nature of the clause as a whole. There are volumes of discussion of the meaning of the phrase "due process of law." There is also some loose and indefinite talk about life, liberty, and property. When, however, one seeks to ascertain the precise signification of "due process of law," he will not get a more definite idea from the decisions than from the concise, but necessarily rather vague, definition of Webster, already cited; and when one examines the cases to learn the meaning of the terms "life," "liberty," and "property," although he may be informed of some of the rights which those terms do include, he gets little or no exact information regarding their precise scope — as to the rights which they do not include. This indefiniteness is particularly noticeable in some of the federal decisions.

The fifth amendment to the Federal Constitution, the object of which is to provide for prosecutions, trials, and punishments (we

have seen that the clauses in question are generally contained in such a section), declares, among other things, that "no person shall be deprived of life, liberty, or property without due process of law." This amendment, like most of the others, was aimed at the federal government only, and the writer has been unable to find a judicial construction of it which throws any light on the present question. The first section of the fourteenth amendment provides that

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The amendments to the Federal Constitution constitute its bill of rights. The fourteenth amendment was the second of a series of three, the purpose of which was to secure to a recently emancipated race all the civil rights that the whole people enjoy, and to give it the protection of the general government in the enjoyment of such rights whenever they should be denied by the States or their agents. It did not add anything to the rights of one citizen against another citizen. Such rights were left to the legislation of the States.[1] The second clause of the amendment is, like corresponding clauses in the State constitutions, taken from Magna Charta, and there is no reason why it should receive a different interpretation. The first decision to put a construction on the fourteenth amendment was that in the Slaughter-House Cases, 16 Wall. 36. In 1869 the Legislature of Louisiana created a corporation called the Slaughter-House Company, which was empowered to maintain stock landings and slaughter-houses at a specified place near New Orleans, and all cattle brought to New Orleans for food were required to be kept and slaughtered at these houses, the company being authorized to demand a compensation for the use thereof. The exclusive privilege thus conferred was to continue for twenty-five years. Certain persons

[1] "It simply furnishes an additional security against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society." U. S. *v.* Cruikshank, 92 U. S. 354.

engaged in butchering in New Orleans brought actions in the State courts to test the constitutionality of this act, and those actions were afterwards carried to the Supreme Court of the United States. It was there contended that the act violated the thirteenth and fourteenth amendments, — the former by creating an "involuntary servitude," the latter by depriving the plaintiffs of their "privileges and immunities" as citizens of the United States, of the "equal protection of the laws," and of property without process of law. The court sustained the act, overruling all the above objections. Three judges, however, filed dissenting opinions, and each had something to say about the meaning of the term "liberty."

Mr. Justice Bradley, in discussing the meaning of the terms "privileges and immunities," quotes the thirty-ninth article of Magna Charta, and then says: —

> English constitutional writers expound this article as rendering life, liberty, and property inviolable, except by due process of law. This is the very right which the plaintiffs in error claim in this case. Another of these rights was that of Habeas Corpus, or the right of having any invasion of personal liberty judicially examined into, at once, by a competent judicial magistrate. Blackstone classifies these fundamental rights under three heads, as the absolute rights of individuals, to wit: the right of personal security, the right of personal liberty, and the right of private property. . . . The Declaration of Independence lays the foundation of our national existence upon the broad proposition "That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." . . . Rights to life, liberty, and property are equivalent to life, liberty, and the pursuit of happiness.

Farther on, referring specially to the life, liberty, and property clause, the same learned judge says: —

> In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. This right of choice is a portion of their liberty; their occupation is their property.

Mr. Justice Swayne took a similar view: —

Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Property is everything which has an exchangeable value, and the right of property includes the right to dispose of it according to the will of the owner. Labor is property, and as such merits protection.

It is rather peculiar that Mr. Justice Bradley, after approving Blackstone's enumeration and definitions of absolute rights, should state that the right to choose an occupation is a part of one's liberty as that term is used in the clauses in question, and imply that Blackstone classifies the right of Habeas Corpus under the right of personal liberty as a distinct part thereof.[1] Blackstone's conception of the terms was more precise. The idea that one's labor is one's property is rather economic than legal, and indeed in another case a passage from Adam Smith's "Wealth of Nations" is the authority cited.

It is, however, to be observed that the court, while it did not much discuss the clause in question here, apparently took a view of it very different from that of the dissenting judges. It decided that a State can, in certain cases, grant a monopoly to a corporation. It asserted that this power is unrestrained by the thirteenth and fourteenth amendments, and that the privileges referred to in the latter are those of citizens of the United States as such. It clearly implied that the ordinary fundamental rights of all persons to hold property, to engage in trade, and all lawful occupations, are not among them. Finally it disposed of the life, liberty, and property clause in the following summary fashion: —

> The argument has not been much pressed, in these cases, that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the fifth amendment as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States. . . . And it is sufficient to say that under no construction of that provision that we have seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

[1] The right to be brought before a magistrate and have one's case examined is not the right of personal liberty any more than the right to a trial by jury is the right of life It is simply "process of law."

The court did not, apparently, consider it even arguable that the restraint upon following their lawful calling was a deprivation of "liberty." Moreover, the decision does not rest, so far as this clause is concerned, upon the ground that the act was a fair exercise of the police power, and so was due process of law. It proceeds on the ground that the fourteenth amendment has no application whatever to such a right as that contended for, namely, the right of every man to pursue a lawful occupation. So that the actual decision in the case is against, rather than in favor of, the broad construction of the term "liberty."

So also in Bradwell *v.* The State, 16 Wallace, 130, it was decided that a law of Illinois denying the females the right to practise law in that State violated no provision of the Federal Constitution, the plaintiff contending that it violated the fourteenth amendment. Here also the court seems to have decided, by implication, that the right to practise a lawful calling is not included in the life, liberty, and property clause. It expressly decided that it is not a privilege or immunity of a citizen of the United States. In Walker *v.* Sauvinet, 92 U. S. 90, the question was whether the right of trial by jury was secured by the fourteenth amendment. It was held that it was not, but there is no direct consideration of the term in question. In Munn *v.* Illinois, 94 U. S. 142, we find a direct statement on the point, although not in the opinion of the court. The question was as to whether a State legislature may fix the maximum of charges for the storage of grain in warehouses situated in large cities, without violating the fourteenth amendment. The court held that this could be done, that where property is devoted to a public use, the States may, in the exercise of the police power, to a certain extent control it, and that the fourteenth amendment cannot be supposed to interfere with the police power. Mr. Justice Field, in a dissenting opinion, contended that the act did violate the fourteenth amendment, and among other things said: —

> By the term "liberty," as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such a manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities and give to them their highest enjoyment.

Butchers' Union Company *v.* Crescent City Company, 111 U. S. 746, is another case where some of the judges insisted upon such a construction of the term as would include the right to follow any lawful occupation. The appellee in this case was the company to which the Legislature of Louisiana had, in 1869, granted the exclusive privileges for slaughter-houses which were sustained in the Slaughter-House Cases. The appellant company had received a grant of privileges of the same kind from the same State, in 1881, but had been restrained from exercising them by the lower courts. The Supreme Court now held that such privileges could be exercised by the appellants, that the power of a legislature to make an irrepealable contract did not extend to subjects affecting the public health and morals, so as to limit the future exercise of legislative power on those subjects, to the prejudice of the general welfare. In a concurring opinion Bradley, J. (with whom agreed Harlan and Woods, JJ.), who dissented in the Slaughter-House Cases, reasoned that the law creating the monopoly which was sustained in those cases abridged the "privileges" of the other citizens of New Orleans, which the fourteenth amendment was intended to protect, and then declared: —

> But if it does not abridge the privileges of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen. And if a man's right to his calling is his property, as many maintain, then those who had already adopted the prohibited pursuits in New Orleans were deprived, by the law in question, of their property, as well as their liberty, without due process of law.

If "property" means pursuit of happiness, as the learned judge has before implied, it is difficult to perceive why there should be any distinction between a calling adopted and one not adopted. In either case one's "pursuit of happiness" may be interfered with by a prohibitive law. It is also difficult to distinguish liberty and property. If the latter has the meaning suggested, probably there is no distinction.

The above seem to be the only federal decisions which throw any light on this subject. In any view they are unsatisfactory. In no case does the opinion which stands as that of the court

discuss the present question, and while it does, in several cases, appear to proceed on the ground that the "life, liberty, and property" clauses do not include rights like that of pursuing any lawful occupation, it might just as well have rested on the ground that the acts in question were a fair exercise of the police power of the State, and so were due process of law. On the other hand, the opinions of the dissenting judges, so far as they concern this particular point, are not only of no authority as decisions, but are also somewhat too vague to be of much value in determining the true meaning of the term.

There are several cases decided in the Court of Appeals, of New York, in which views similar to those of the dissenting judges in the above cases were expressed. The first of these was Bertholf *v.* O'Reilly, 74 N. Y. 509. The remarks in that case, on the present question, were only by way of dictum, but they have been approved and enlarged upon in subsequent cases. The question was as to the validity of an act of the New York Legislature creating a cause of action in favor of a person injured by the act of an intoxicated person, against the owner of real property, whose only connection with the injury was that he leased the premises whereon the liquor causing the intoxication was sold. The defendant, a property owner, did not contend that the act was a violation of his "liberty." He argued (1) that it was an infringement of his right of property, and (2) that it violated another and distinct section of the New York Constitution, — already cited, — which declares that no member of the State shall be deprived of *any* of his rights unless, etc. The act was held a valid exercise of the police power, but the court took occasion to remark that "one may be deprived of his liberty in a constitutional sense without putting his person in confinement; the right to liberty includes the right to exercise one's faculties and to follow a lawful occupation for the support of life."

This view was followed in the case of *In re* Jacobs, 98 N. Y. 98, where an act prohibiting the manufacture of cigars in tenement-houses was held unconstitutional, as being an infringement of the rights of liberty and property, and as not being a proper exercise of the police power. The court says: —

> So, too, one may be deprived of his liberty, and his constitutional rights thereto violated, without actual imprisonment or restraint of his person. Liberty in its broad sense, as understood in this country,

means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or occupation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed under the police power), are infringements upon his fundamental rights of liberty, which are under constitutional protection.

It is not clear whether the court had in mind the clause in the New York Constitution, protecting all rights, or that protecting simply life, liberty, and property. The defendant cited both clauses. Probably the court did not distinguish them.

People *v.* Marx, 99 N. Y. 377 (1885), is a similar case. Here a law prohibiting the manufacture and sale of oleomargarine was held void, as violating the clause protecting life, liberty, and property, and also that protecting any of the rights of a citizen of the State. The court says that it is now settled that "it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit," and then repeats the statements in the other New York cases that the term "liberty" includes the right to be free in the enjoyment of all the faculties with which one has been endowed by his Creator.

People *v.* Gillson, 109 N. Y. 399 (1888), was decided on the same ground. A statute made it a misdemeanor for any person who sold food to give away therewith, as a part of the transaction of sale, any other thing as a premium, gift, etc. The court held the act void as infringing liberty and property, and said: —

> The defendant here appeals for his protection to the clause in the constitution which provides that no person shall be deprived of his life, liberty, or property, without due process of law. The meaning of this provision in our State constitution has frequently been the subject of judicial investigation, and this court has had occasion very recently to discuss it. The following propositions are firmly established and recognized: A person living under our constitution has the right to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit. The term "liberty," as used in the constitution, is not dwarfed into mere freedom from physical restraint of

the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare.

The last New York case in which the point has been touched upon is People *v.* King, 110 N. Y. 418, where the court remarked, *obiter:* —

It is not necessary at this day to enter into any argument to prove that the clause in the bill of rights is to have a large and liberal interpretation, and that the fundamental principle of free government, expressed in these words, protects not only life, liberty, and property, in a strict and technical sense against unlawful invasion by the government, but also protects every essential incident to the enjoyment of those rights.

There is also a very recent decision by the Court of Appeals of West Virginia [1] in which similar expressions are used. An act of that State prohibited persons engaged in mining and manufacturing from issuing for the payment of labor any order or paper except such as was specified in the act. The court held such act void as being "an encroachment both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him." The court cites with approval the passage in People *v.* Gillson, above quoted. Although, however, the opinion does apparently rest upon the ground that the act was an infringement of the plaintiff's liberty, the "life, liberty, and property" clause strictly so called is not mentioned at all. The court quotes an entirely different section of the constitution of West Virginia, namely, article 3, section 1, which declares, like the Declaration of Independence, that all men are born free and equal, and have the right to pursue happiness, etc. Such a clause may well be held to include all the rights which the laws of West Virginia afford. It is also noticeable that the act is held to be an invasion of the right of property, and that the expressions used by the minority of the Supreme Court of the United States in the Slaughter-House Cases are repeated. The court says: "The property which every man has in his own labor, as it is the original founda-

[1] State *v.* Goodwill *et al.*, 10 S. E. Rep. 285. For similar cases see Godcharles *v.* Wigeman, 113 Pa. St. 431, and Hancock *v.* Yaden, 23 N. E. Rep. 253. In the former case the act was declared "utterly unconstitutional and void" without further discussion.

tion of all other property, so it is the most sacred and inviolable." "The vocation of an employer, as well as that of his employee, is his property."

The writer has been unable to find any more satisfactory consideration of the subject than that represented by the above cases. As before remarked, the result of those cases is doubtful, their value small. They neither establish, nor much help to establish, the precise meaning of the term, and if they represent the existing law, the question is still an open one. All that can be said is that there is a tendency to give to the clause as a whole a wide scope, and to the term "liberty" a meaning at least sufficiently broad to include what are sometimes classified as "civil" rights, meaning thereby not all the rights of a citizen, not those of life and property, and not those great liberties which are commonly provided for in special clauses in our bills of rights, but simply freedom from restraint in the ordinary pursuits and avocations of the citizen. In the few cases in which there is anything like a clear and definite decision, the question before the court was whether the term included the right to pursue any lawful occupation in a lawful manner, — and it was decided that it did, that every person has the liberty to "exercise his faculties in all lawful ways." Whether, if the point should squarely come up, the courts would so interpret the term "liberty" as to render it prohibitive of any legislative invasion of the right of marriage, of education in the public schools, of resorting to any place of public amusement, and of receiving proper accommodation at the hands of innholders or common carriers, is not clear. The remarks of some of the judges would seem to indicate that result, and such rights are apparently often classified with the right to pursue any occupation, or to "exercise one's faculties," as "civil" rights. The cases in which there has been any discussion of such rights have arisen since the late war, and the question has always been as to the validity of statutes making certain discriminations in these matters between white and colored persons. These cases have always been decided with reference to that provision in the fourteenth amendment securing the "equal protection of the laws," and of course they naturally call for an interpretation of that clause rather than the one here in question.[1]

As regards the tendency to give the clause a broad interpretation,

[1] Pomeroy on Constitutional Law, p. 256 *n*-2.

and at the least to include within the term "liberty" the right to follow any lawful calling, natural and reasonable as such a construction may at first glance appear, it seems, upon examination, to have little real foundation either in history or principle. The use of the term "civil" to denote the ordinary substantive rights, other than life and property, which every citizen has, and constantly exercises in his daily life, is of recent origin, probably not extending back farther than the War of the Rebellion, and a construction of the term "liberty" making it coextensive with "civil rights" in that limited sense of the term "civil," seems to be unhistorical and arbitrary. One is obliged to ask why it should include thus much and no more. If it includes the right to pursue any lawful trade, why should it not include the right to worship in any lawful manner, to print or speak in any lawful manner, and to exercise one's political privileges in any lawful manner? Possibly, if the point should arise, it would be held to include all the above liberties, although the writer has not found any statements in the books to that effect. The reasons for supposing that the term should not be so interpreted have already been set forth.

Charles E. Shattuck.

CAMBRIDGE, 1890.